

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**ORIGINAL**

In the Matter of )

1998 Biennial Regulatory Review -- )  
Streamlining of Mass Media Applications, )  
Rules, and Processes )

MM Docket No. 98-43

To: The Commission

**RECEIVED**

JUN 16 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF WAIMEA BROADCASTING, INC.**

Waimea Broadcasting, Inc.<sup>1</sup> ("WBI"), by counsel, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, FCC 98-57, 63 FR 19226, published April 17, 1998 (hereafter "NPRM"). Specifically, WBI addresses the Commission's proposal to extend the duration of a construction permit up to three years. WBI supports the Commission's proposal to extend the construction period and submits that the goals the Commission seeks to further by extending the construction period will not fully occur unless the new construction period applies to all current or outstanding construction permits that have not yet exceeded the three-year period. In support hereof the following is shown.

The Commission proposes to extend the construction period to three years in an effort to fulfill its goal of streamlining FCC procedures and reducing the paperwork and administrative

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<sup>1</sup> WBI is the permittee of KAGB(FM), Waimea, Hawaii. WBI was formed when two mutually exclusive competitors for the Waimea station merged their applications. WBI filed an application to extend the KAGB permit in April 1995 (File No. BMPH-950417JD). In April 1997 (more than two years after the application was filed), the Audio Services Division ("Division") denied the requested extension. WBI sought reconsideration of the Division's action in May 1997. The Division denied reconsideration in September 1997 on different grounds. WBI filed an Application for Review on November 3, 1997, which is pending.

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burdens in a manner that coincides with the Commission's plan to issue construction permits for new stations and major station modifications through an auction process. NPRM at para. 60. The Commission proposes to apply the new three-year construction period to all construction permits that are within their initial construction period (18 months for radio and other facilities, 24 months for television), but not to construction permits that are beyond their initial construction period. The Commission believes "that it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification)." NPRM at para. 68. However, the Commission did not explain the reason why it believes it would be "administratively unworkable," and prior Commission actions and common sense suggest that failing to extend the three-year construction period to all outstanding or pending construction permits that have not yet reached a three-year period would be far less burdensome and more easily workable than the Commission's initial proposal.

#### DISCUSSION

The primary purpose of the Commission's proposal to extend the construction period is to reduce paperwork and administrative burdens, which will in turn fulfill the Commission's goal of streamlining its processes and procedures. See NPRM at para. 60. In the NPRM the Commission stated that its current administrative burden includes a "fact-intensive analysis involved in processing" extension applications that requires substantial staff resources. NPRM at para. 57. The Commission further noted that in addition to the burden placed on its staff resources, the current

scheme also "places a substantial administrative burden on permittees and in some instances may actually create a barrier to prompt completion of construction." NPRM at para. 58.<sup>2</sup>

WBI supports the Commission's proposal to apply a uniform three-year construction term to all construction permits as a way to reduce the necessity for extensions and the Commission's administrative burden in processing and reviewing extension applications. Assuming the Commission adopts a three-year construction term, WBI also generally supports the Commission's proposals to: (a) limit the circumstances under which the Commission will grant extensions;<sup>3</sup> (b) not provide additional time upon an assignment, transfer of control, or modification; and (c) institute an automatic forfeiture provision upon expiration of a permit. See NPRM para. 59.

WBI does not, however, agree with the Commission's proposal to apply the new construction term to only those construction permits that are within the initial construction period. See NPRM

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<sup>2</sup> The Commission also stated, "if a permittee is unable to complete construction prior to expiration of the permit, the permittee is not only faced with the burden of completing and filing an extension application but the permittee must also wait a typical interval of two months while the staff processes the extension request. . . . [t]he permittee remains unsure of the construction permit's status (*i.e.*, the pending extension application might be denied) and therefore any construction progress made during this period is at a permittee's own risk. Given this uncertainty, many permittees choose not to proceed with construction while an extension application is pending." NPRM at para. 58. In WBI's case, the processing interval was more than two years, not two months. The uncertainty that the Commission describes was magnified considerably in WBI's case, with significant adverse consequences to WBI's principals. It is difficult if not impossible to make appropriate plans while an application is pending before the Commission. Being placed in such a position for two years means that a permittee or its principals must place its plans or their professional lives "on hold" while awaiting Commission action.

<sup>3</sup> WBI notes, however, that obtaining local government approvals, such as zoning, can sometimes be a lengthy process even when an applicant proceeds diligently, and the Commission should allow permittees to make a showing that such circumstances beyond their control have prevented construction. However, adoption of the three-year construction term would presumably make it more difficult to make such a showing.

para. 68. The Commission suggests ("we believe") "that it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods ...." Ibid. There is, however, no predicate for the Commission's "belief," and it is contrary to previous findings and actions which the Commission has taken in similar circumstances.

The Commission last extended the construction term in 1985. See Amendment of Section 73.3598 and Associated Rules Concerning the Construction of Broadcast Stations, 102 FCC 2d 1054 (1985) (extending the construction periods for radio and television stations from 12 and 18 months to 18 and 24 months respectively). In its Memorandum Opinion and Order the Commission stated, "[w]e believe that providing more time initially for the building of facilities can substantially reduce the volume of requests for extension of time to construct. This will reduce the administrative burdens imposed on Commission personnel, thus allowing scarce staff resources to be better utilized." 102 FCC 2d at 1057. Thus, the Commission's extension of the construction term in 1985 occurred for reasons similar to those underlying the Commission's current proposal.

The Commission applied the new construction period adopted in 1985 to all outstanding or pending permits, including permits that were beyond the initial construction period. See TV-8, Inc., 2 FCC Rcd 1218 (1987). In TV-8 the Commission affirmed the grant of a six month extension to construct for an applicant that had pending on the effective date of the new rule a petition for reconsideration of a denial of an extension application. The six month extension was granted without determining the merits of the reconsideration petition. The Commission affirmed the policy that all permittees should have the benefit of the new construction period. 2 FCC Rcd at 1220. There was no suggestion that applying the new construction term to permits that were beyond the initial construction period under the previous rule was "administratively unworkable." The

Commission applied the extended construction period to all permits regardless of whether the permit was within the initial construction period, thereby allowing all permittees to have the full extent of the new construction term in which to build their station. If a permittee had not completed construction at the end of the new construction period, it was required to meet the newly adopted criteria for obtaining an extension of the permit. See Amendment of Section 73.3598, 102 FCC 2d at 1058 n. 13. The Commission did not, however, apply the new construction period to permits that had expired long before the adoption of the new construction period if a party sought to have a permit reinstated. See TV-8, 2 FCC Rcd at 1220.

There are no discernible differences between the current conditions which have led to the Commission's proposals in the NPRM and those that existed in 1985 that would justify changing Commission policy and not extending the new three-year construction period to all permittees that have not had the benefit of a three-year construction period.<sup>4</sup> The Commission is expected to treat similarly situated parties similarly. See Melody Music, Inc. v. FCC, 345 F. 2d 730, 732 (D.C. Cir. 1965). Just as the Commission did when it modified the construction period in 1985, the Commission should apply any new construction period adopted in this proceeding to all outstanding permits, including those for which there is a pending petition for reconsideration or application for review of an extension application, as long as the total construction period does not exceed the duration of the new construction term.

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<sup>4</sup> In fact it is likely that the administrative burdens the Commission faced in 1985 were greater than those that currently exist because of the multitude of new FM stations and station modifications that resulted, at least in part, from the Commission's MM Docket 80-90 and 84-231 proceedings authorizing several new classes of FM stations and over 650 new FM allotments.

Thus, for example, if a permittee has had only the initial 18 or 24 month construction period under the current rule, and assuming the Commission adopts a three-year construction period, that permittee would have an additional 18 or 12 months added to its construction permit to equal the full three-year period. If a permittee already had 30 months in which to construct (based on either extensions or a modification of its permit) it would receive an additional six months, again equaling the new three-year period. Just as the Commission did not distinguish between a permit that was within the initial construction period and one for which an extension application was under review in applying the 1985 rule change, so too it should apply the same policy in the context of this proceeding.<sup>5</sup> Once a permittee has had three years in which to construct it would have to meet the Commission's new criteria for obtaining a further extension.

The Commission's tentative proposal to not apply the new construction period to those permits that are beyond the initial construction period will not fully accomplish the "streamlining goals of reducing the necessity for extensions and thereby reducing paperwork and administrative burdens." See NPRM para. 60. To the contrary, such an approach would be considerably more burdensome than applying the same policy the Commission applied the last time it extended the authorized construction period. Rather than simply extending existing construction permits for the amount of time needed to provide a three-year construction period, if the Commission does not apply the new construction period to all permits it will still need to engage in the "fact-intensive analysis involved in processing" extension applications for those permits that are beyond the initial

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<sup>5</sup> This policy would not, however, apply to a permit that had already expired and for which no timely extension or reinstatement application was filed or for which there existed a final decision terminating or canceling the construction permit. An application for which a petition for reconsideration or application for review is pending is not final and thus remains outstanding.

construction period. See NPRM para. 57. Indeed, added to this is the burden of processing and evaluating petitions for reconsideration, applications for review and potential court appeals that would likely raise various issues including whether the Commission has failed to apply its current rules in a consistent manner.<sup>6</sup> The Commission will have a far greater administrative burden if it applies multiple construction periods and extension policies than if it applies a uniform construction term and extension policy to all outstanding permits.

Wherefore, for the foregoing reasons, WBI supports the Commission's proposal to adopt a three-year construction term, but urges the Commission to apply the new construction period to all outstanding permits, whether or not the permit is beyond its initial construction period.

Respectfully submitted,

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<sup>6</sup> See e.g., WBI's Application for Review in BMPH-950417JD, filed November 3, 1997.